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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-208

ROBERT T. CARSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Robert T. Carson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his criminal conviction.

Opinion Below

The opinion of the Court of Appeals is not yet reported. It is set forth in Appendix A to this petition (1a).*

Jurisdiction

The opinion of the Court of Appeals was filed on July 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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* The Appendices to this Petition are submitted in a separate bound Volume.

Constitutional and Statutory Provisions Involved

(1) The Fifth and Sixth Amendments to the United States Constitution.

(2) 18 U.S.C. §§ 2 (Principals); 201 (Bribery of public officials and witnesses); 371 (Conspiracy); 1621 (Perjury); and 1952 (Interstate and foreign travel or transportation in aid of racketeering enterprises).

These provisions are set forth in Appendix B to this petition (27a).

Questions Presented

I. Where a Congressional aide, whose work involved limited dealings with the Department of Justice, allegedly participated in a plan whereby he was to be compensated in return for exerting personal or political influence upon an officer of the Department of Justice for the purpose of altering the course of a federal prosecution, are the activities of the Congressional aide in this regard "official acts" or "acts in violation of his lawful duty" as those terms are defined in 18 U.S.C. § 201?

II. Where, following the abandonment of the plan set forth above, the same aide allegedly participated in a plan whereby he was to be compensated in return for exerting some unspecified influence upon unspecified persons for the purpose of securing a lenient sentence for someone yet to be convicted, does his participation in such a plan involve his own "official acts" or "acts in violation of his lawful duty" as those terms are defined in 18 U.S.C. § 201?

III. If either question I or question II is answered in the negative, must the Petitioner's conviction under the conspiracy count, which charged both objectives, be reversed since the Court's charge permitted the jury to convict

if it found the Petitioner to be the subject of a bribe for the purpose of attaining either one of these objectives?

IV. Under the circumstances of this case, was the Petitioner deprived of a fair trial when the Deputy Attorney General of the United States, in his testimony as a prosecution witness, was called upon to, and did, combine his personal knowledge with unspecified hearsay for the purpose of giving the jury his opinion that the Petitioner was guilty of the crimes charged?

V. Under the circumstances of this case, did the Petitioner's claim of Congressional and Fifth Amendment privilege, before the Grand Jury, constitute an effective recantation of the testimony which had just previously been given by him, so as to negate a charge of perjury based upon that testimony?

VI. Did the prosecutor's credibility and personality become such central factors during the trial that the Petitioner was deprived of a fair trial?

Statement of the Case

A. The Charges

An indictment was filed on January 13, 1971, in four counts against petitioner and two co-defendants, Edward Adams and Joseph Bald. Count One charged the three defendants with conspiracy to travel in interstate commerce in furtherance of the unlawful activity of bribery, in violation of Title 18, United States Code, § 371. Counts Two and Three charged the three defendants with traveling in interstate commerce in furtherance of the unlawful activity of bribery, in violation of Title 18, United States Code, § 1952. Count Four charged petitioner alone with perjury before a federal grand jury, in violation of Title 18, United States Code, § 1621.

The petitioner was tried alone. The jury found him guilty on Counts One and Four (conspiracy and perjury),

and not guilty on Counts Two and Three (interstate travel to promote bribery) of the indictment.

On January 4, 1972, petitioner was sentenced to concurrent terms of imprisonment for 18 months on each count and fined $5,000 on Count One.

B. Summary

Through the testimony of one co-defendant, a co-conspirator and an undercover F.B.I. agent, allegedly corroborated by tape recordings, the Government sought to prove that petitioner, the Administrative Assistant to a United States Senator, joined in a conspiracy, the main objects of which were to receive a bribe and to pay a bribe to high-ranking officials of the Department of Justice to quash investigations into Securities Act violations and to obtain leniency for one of the subjects of the investigations once he had been indicted. The Government further sought to prove that petitioner lied under oath to a federal grand jury when he denied knowing or hearing of the other members of the conspiracy.

The petitioner testified in his own behalf at trial and denied being a party to the scheme, maintained that a $2,500 cash payment received from his co-defendant was a campaign contribution, and claimed his grand jury testimony was not knowingly and intentionally false. Another defense witness and documentary evidence were used by the defense to corroborate petitioner's testimony.

C. The Background and Relationships of the Various Individuals Involved

An understanding of the facts and legal issues requires a familiarity with the background and relationships of the various individuals involved. We will here set forth that background up to, but not including, the point at which the petitioner is alleged to have become a participant in the conspiracy charged by the indictment.

1. *Petitioner Robert T. Carson*—At his trial, petitioner testified as a witness in his own behalf. He is a citizen of the State of Hawaii, where, in his earlier years, he was an investment banker and president of the Honolulu Stock Exchange. He has held every significant office in the Republican party there and was its Chairman for eight years. In January, 1962, following service as Director of the Federal Housing Administration for Hawaii and Guam, he was appointed Administrative Assistant to United States Senator Hiram Fong of Hawaii. On April 25, 1968, pursuant to Rule XLIII of the United States Senate, he was authorized to raise, receive and manage political funds in behalf of Senator Fong. At the time of the events of this case, he was the president of the United States Senate Staff Club, having previously served two terms as president of the Administrative Assistants' Association for the United States Senate (Tr. 1323-33).*

2. *Richard Kleindienst*—At petitioner's trial, Mr. Kleindienst testified as a witness for the Government.

During the period leading to the Republican National Convention of 1968, petitioner was active in behalf of the candidacy of Richard M. Nixon. In that regard, he worked closely and met frequently with Mr. Kleindienst, who was then National Director of Field Operations for Nixon's campaign committee. After the election, Kleindienst was named Deputy Attorney General of the United States, a position characterized as "Number 2 man in the Department of Justice" (Tr. 1139-40, 46-47).**

Among Kleindienst's duties was the responsibility for making recommendations to the President, through the

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* In this petition, references to the trial transcript are preceded by "Tr."; references to the Appendix filed in the Court of Appeals are preceded by "A"; and references to the Appendices annexed to this petition are followed by "a".

** During the pendency of the appeal herein, Mr. Kleindienst was elevated to the position of Attorney General of the United States.

Attorney General, for appointments of Federal, District and Circuit Court Judges, United States Attorneys and United States Marshals. In that capacity, Kleindienst would confer with Republican Senators and their Administrative Assistants for the purpose of selecting candidates for appointment. Kleindienst thus continued in official contact with petitioner due to the need for agreement upon such appointments, as well as concerning other Justice Department matters. In addition, they would meet socially (Tr. 1148-56).

3. *Edward (Eddie) Adams*—Adams was named as a co-defendant in the instant case. Prior to trial, he entered a plea of guilty to Count 2 of the indictment (travel in interstate commerce). Following the trial, he was sentenced to a three month term of unsupervised probation and was fined $5,000 (2a, fn. 1). He was not, therefore, a party to the trial, and he did not testify. At the time of the events of this case, Adams was an eighty year old New Yorker who supposedly had substantial political connections, particularly in Washington (2a, fn. 1; 3a).

During the spring of 1970, one Irving W. Swanson requested Adams to solicit political contributions for the re-election of Senator Fong. In the late summer of 1970, Adams came up with such a contribution, in the form of a check, and requested the opportunity to personally deliver it to a member of the Senator's staff. It was in this way that, shortly before the events of this case, Adams and petitioner first met. The check, made out to "cash", had been drawn on a corporate account, and was represented by Adams to be a contribution from one Robert Brinsmade. After Adams left, petitioner realized that it was a corporate check which may not be given as a political campaign contribution, so he voided it and had it returned to Adams. Adams said he would try to replace the check with cash. Swanson testified to these facts as a witness for the defense (Tr. 1291-1305; Defendant's Exhibit U in Evidence; Tr. 1356, 1365).

On November 6, 1970, the signatory on the check, Brinsmade, sent a telegram to Senator Fong, congratulating him on his re-election, and advising that he intended to visit with Fong on his next trip to Washington (Defendant's Exhibit W in evidence, Tr. 1370-71).

As will appear, an important element of the prosecution's case was that petitioner later accepted from Adams an envelope which contained $2,500 in cash, allegedly representing "front money" for the bribery attempt. It was the contention of the defense that the money in question was reasonably understood by petitioner to be Dr. Brinsmade's substituted contribution for the corporate check. This was particularly so since, on the morning of the day that the money was paid, Adams called petitioner and told him that he would see him later in the day with the Brinsmade money (Tr. 1365).

4. *Michael Hellerman*—Hellerman is now known to have been a prolific stock swindler who turned agent provocateur to save himself from his misdeeds. While apparently the prime mover (2a, 3a, 5a) in the alleged plot in this case, he was in fact working with the government and knowingly introduced an undercover FBI agent into these events. Although Hellerman was intricately involved, and the alleged plot was supposed to be primarily for his benefit, he was not indicted and the government did not call him as a witness.

5. *Joseph Bald*—Bald was named as a co-defendant. Prior to trial, he entered a plea of guilty to count 1 (conspiracy) and he thereafter testified as a government witness. Following the trial, he was sentenced to a term of two years imprisonment, twenty months of which were suspended (2a, fn. 1).

Bald is an interior decorator whose problems developed when he was induced into illicit stock transactions by Michael Hellerman. His relationship with Hellerman was

well described by the prosecutor at the time of Bald's sentence:

> ". . . I would say to your Honor that the evidence we have has led us to believe that Mr. Bald is decidedly a follower in all these situations, was led into each of these situations—stock fraud situations—by Mr. Hellerman, and that it was in an effort to extricate himself from these situations that he fell into this situation and it is not the type of situation in which he was the prime motivating force or the most evil of the individuals who participated" (A. 252-253).

6. *Harold Blond*—Blond is a university fund raiser and the brother-in-law of Bald. He was named as a co-conspirator, but not as a defendant. He testified as a witness for the Government.

In September, 1970, Hellerman advised Bald that they were both under investigation by the Securities and Exchange Commission and by the United States Attorney's Office for the Southern District of New York in connection with certain stock transactions (2a). Before this predicament arose, Bald had mentioned to Hellerman that his brother-in-law, Blond, was a friend of a person who held a great deal of influence in Washington—Eddie Adams. With this recollection, Hellerman told Bald to set up a meeting with Adams for the purpose of finding some way to terminate the investigation (2a-3a; Tr. 545-548; 583, 596, 601, 604, 1032-3).

In early November, the meeting was held at Blond's office. Bald, Adams and Blond were present. Adams agreed to help terminate the investigation, but said that it would cost a large sum of money and wondered whether Hellerman could afford it. Bald responded that Hellerman could pay anywhere from $50,000 to $100,000 (Tr. 340; 1034-1033).

Adams indicated that he would set up an appointment for Bald and Hellerman to meet with the petitioner, who he identified as being the Administrative Assistant to Senator Fong. He further said that $100,000 would have to be held in escrow and that it would be going to Senator Fong and to individuals in the Justice Department. In the interim, there would have to be $2,500 to $5,000 advanced as "seed money" for the petitioner (Tr. 550; 1034-1035).

After the meeting, Bald reported this information to Hellerman, who told him that it was too early to pay "front money" (Tr. 551).

A day or so later, Adams called Blond and told him that the appointment was set (Tr. 1036). A day before going to Washington, Bald and Adams met. Bald testified that at this second meeting with Adams, Adams told him not to mention money to the petitioner (Tr. 554). This testimony is particularly significant in view of the petitioner's defense at trial, i.e., that he had no knowledge of a bribe.

D. The Meeting of November 16, 1970

On November 16, 1970, Bald and Hellerman met with the Petitioner at the office of Senator Fong in the New Senate Office Building. Hellerman allegedly told the petitioner of the investigations, that indictments were expected shortly, and that if the petitioner could quash all the SEC matters, "we will pay you $1,000,000." Petitioner allegedly inquired about the identity of the prosecutor who was involved and whether the indictments could be delayed. Hellerman responded that the prosecutor's name was Morvillo and that delay was unlikely (3a, Tr. 555-558).

As it turned out, the anticipated indictment was filed against Hellerman, Bald and 15 other defendants on November 19, 1970 (3a).

E. The Petitioner's Meeting With Kleindienst—November 24, 1970

On November 24, 1970, petitioner met with Kleindienst at the latter's office in the Department of Justice. Kleindienst's version of what occurred, as given at trial, was as follows:

> "Well, after we had exchanged pleasantries, Mr. Carson sat down in a chair in front of my desk and said that he had a friend in New York who was in trouble, and that I could help him with respect to his trouble, his friend was a man of substantial means and would be willing to make a substantial contribution of between $50,000 and $100,000 to the re-election of President Nixon.
>
> "I asked him what kind of trouble this man had. Mr. Carson said that he was under indictment for federal offenses, and I said that under no circumstances could I do anything about the matter, even look into it, as a result of the fact that a Grand Jury had returned an indictment.
>
> "That was just about all the conversation that existed.
>
> "We immediately thereafter—we turned the subject matter to other matters [which Kleindienst thereafter testified concerned a judicial appointment from the State of Hawaii]" (Tr. 1143-1144; 1167).

At most, according to Kleindienst, the total conversation lasted fifteen minutes (Tr. 1165) and that part which concerned the New York indictments was not more than a minute or two (Tr. 1167).*

Petitioner testified that his meeting with Kleindienst resulted from a controversy that had developed concerning

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* At trial, Kleindienst testified that he did not get the impression that he had been offered a bribe (Tr. 1171, 1174-76; See pp. 29-33, *infra*).

the fact that no one from Hawaii sat on the United States Court of Appeals for the Ninth Circuit and an opening had recently occurred which made such an appointment possible. On the very day that petitioner went to see Kleindienst, a letter had been received at Senator Fong's office from the Attorney General of the United States, acknowledging the Senator's recommendation for the vacancy, and this was what had occasioned the meeting (Defendant's Exhibit K in evidence, Tr. 1163,1379). While there, he mentioned the Hellerman meeting as follows:

> "I said to Mr. Kleindienst that a couple of men had talked to me about a problem they had, and that they were willing to make a contribution to the Republican party in the amount of $50,000 or so.
>
> "Subsequent to their talking to me, I saw in the papers where there was an SEC indictment. I told him that I had said to these people that there was nothing that I could do in the matter and I was just relating it to him for his confirmation.
>
> * * * * *
>
> "He said, 'you're right, Bob; there is nothing you can do for anyone under indictment'" (Tr. 1383-1384).

F. The Meeting of November 29, 1970—Entry of the Undercover FBI Agent

During the period of time since the meeting of November 16th, Hellerman met with Bald about three or four times a week, pressing for a revival of the plans to quash the prosecution (Tr. 561). He told Bald that he had someone who would furnish the large sum necessary to fix the case, but that he wanted that person to meet Adams. A meeting was eventually arranged for November 29, 1970 at LaGuardia Airport.

On November 29th, Agent Paul Brana of the Federal Bureau of Investigation was advised for the first time that

he was to be involved in an undercover investigation of this case. On that day, he met with Assistant United States Attorney Morvillo and Michael Hellerman*—the man who pressured Bald to seek influence in Washington (Tr. 776).

It is of particular significance that Brana's recollection is that Hellerman may have told him on that day that petitioner had previously said there was nothing he could do for either Hellerman or Bald (Tr. 784).

Brana then accompanied Hellerman to the airport, where they met Bald and Blond. Brana was introduced as the "friend" of Hellerman, under the name of Paul Bicera (Tr. 565, 627).

Blond told them that an attempt had been made to prevent the indictment through the petitioner, and that the petitioner had said that nothing could be done if there was an indictment (Tr. 628-638).

Brana told the group that he could come up with as much as $200,000 but that he "was still skeptical as to whether or not Mr. Carson could deliver." By this time, Adams had joined the group at the airport and, according to Brana, he claimed that both Senator Fong and Attorney General Mitchell had given their hand shakes on the matter and made assurances that petitioner could deliver. Brana pressed his skepticism and Adams said that he would set up an appointment so that Brana could personally speak to the petitioner (Tr. 636).

G. The Meeting of December 1, 1970

On December 1, 1970, Brana (with three concealed microphones strapped across his chest), Adams and Blond

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* The record is silent as to when Hellerman first started working with the Government. The only persons who could answer that question were Hellerman—who did not testify—and Morvillo —who prosecuted this case.

flew to Washington (Tr. 637-639). This trip was charged as Count 2 of the indictment (interstate travel), upon which petitioner was acquitted.

When they arrived at the Senate Office Building, Adams instructed Brana and Bald to wait outside for fifteen minutes and then to proceed to the office of Senator Fong. Adams, himself, entered the building immediately. When they arrived at Senator Fong's office, Brana was introduced to petitioner as Paul Bicera (Tr. 639-641).

Blond recalls that during the brief conversation that ensued, all of the parties remained standing (Tr. 1064-1065).*

During the course of the conversation, the recording devices which Brana had secreted on his person were operating. Government Exhibit 4 in evidence (A. 291-294) is a transcript of the audible portions of the resulting tape recording. The uncontested audible portions of the tape make four things clear:

1. Mr. Carson categorically said ". . . we cannot do anything to get them off" (A. 291);

2. He also said: "the only thing that we might be able to do and I stress the word might (inaudible) is to give some leniency later on" (A. 291);

3. Brana, in an aside to Adams, made clear that he understood what Carson had said: e.g., "You know, he just said he doesn't want to touch it" (A. 292);

4. Carson attempted to discourage the others from pursuing their efforts: ". . . my advice right now is don't waste your energy and your money.

* This is particularly significant in view of the defendant's testimony that his main thought was to get these people out of his office as quickly and diplomatically as possible (Tr. 1390, 1449, 1460, 1469).

save them for the possibility that sometime you might be doing some good with it. I don't care who you go to now" (A. 293).

After the three visitors had left Carson's office, and were out of Carson's presence, Adams revived the question of "seed money." This was the first time that the matter was mentioned during the day, and it had never been mentioned in Carson's presence according to the testimony of Brana, Bald and Blond (Tr. 644-646). Adams became "very perturbed" when Brana told him that he didn't have $2,000 in seed money with him (Tr. 644).

H. The Meeting of December 29, 1970

After further discussions among Hellerman, Brana, Bald and Adams concerning the possibility of additional indictments, they agreed that $2,500 would be advanced as to petitioner and that a $100,000 contribution would be made to President Nixon's next election campaign, depending upon what could be done (Tr. 648-652).

On December 29, 1970, Brana went from New York to Washington, where he met Adams. Brana was again equipped with electronic surveillance equipment,* and he brought with him $2,500 in cash.

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* An examination of the subsequent recordings reveals that: 1) they are permeated with inaudibility, particularly at those points which are crucial to an accurate interpretation of conversations; and 2) it is clear that Brana realizes the end is coming and attempts to load the tapes with extended self-serving declarations.

Petitioner requested that the Court of Appeals listen to the three tape recordings which were introduced into evidence over the objection of the defense. It is his contention that these recordings were so defective as to be prejudicially misleading to the defense. The problem was compounded by the fact that the jury was given transcripts of the recordings which deprived them of the opportunity to fairly come up with their own impressions as to the contents of the tapes. The Court of Appeals does not appear to have honored petitioner's request.

Adams insisted that the money be given to him, and that, additionally, he be given $200.00 in expenses. Upon Adams' promise that he would give the money to petitioner in front of Brana, Brana turned it over to Adams (Tr. 655).

They then departed for petitioner's office. Shortly after they met petitioner, Adams placed an envelope containing the $2,500 on petitioner's desk (Tr. 655-656). The payment of this money fits in perfectly with the chronology of the replacement of the Brinsmade check, discussed *supra*, at p. 7. Moreover, petitioner testified, without contradiction, that Adams obtained the appointment by calling earlier in the day and claiming that he would drop in with Brinsmade and the replacement. This is verified by the defendant's comments on the tape (A. 318).

Brana then immediately went into an explanation of why they had come down to see Carson, implying that he was interested in seeing future indictments quashed. Carson's reply to this was: "I can't really can't, I really can't." He then switched the conversation to a picture that was hanging on the wall (Tr. 307-308).

During the course of the subsequent conversation, Brana found it necessary to refresh Carson's recollection as to the names of Hellerman and Bald who had been down to see him more than a month before (A. 308; see also 309-310).

The petitioner contends that the audible portions of the remainder of the tape establish (and the inaudible portions would confirm) that: 1) he was diplomatically attempting to discourage Brana from the impression that anything could be done; and 2) he refused to be drawn into a discussion about money, except to the degree of making generalized statements which had the effect of appearing to postpone the discussion so as to avoid a confrontation. We respect-

fully urge that a hearing of the tapes, to the degree they are audible, will support this assertion.

In support of his defense that he truly believed the $2,500 to be the replacement for the Brinsmade check, the defendant established that it was treated as such and placed in the Senator's safe. It was produced at trial.

I. The Perjury Charge

At 11:00 P.M. on December 30 1970, the petitioner was served at his home with a subpoena which had been prepared by the prosecutor, Mr. Morvillo (Tr. 1404). The subpoena directed him to appear before a Grand Jury in the Southern District of New York, "to testify and give evidence in regard to an alleged violation of Section Title 18, United States Code" (sic.). It is to be noted that the subpoena gave no indication whatsoever of the section of 18 United States Code involved (Defendant's Exhibit Y in Evidence, Tr. 1404; A338).

As directed, the petitioner appeared at the office of Assistant United States Attorney Baer who took him to the grand jury room. He was there questioned by Mr. Morvillo in the presence of the Grand Jury and Mr. Baer (Tr. 1406; A. 321). It was when he was before the Grand Jury that he learned for the first time that he was a target of the investigation (Tr. 1407) and he was given a broad description of the charges under investigation, without reference to the persons or incidents involved (A. 321-322). He was also advised of his right against self-incrimination, his right to counsel, and that a deliberate lie would subject him to a perjury prosecution (A. 322-323).

After responding to questions concerning his address and the nature of his employment (A. 323-325), he was asked to identify various individuals. Those questions and answers which form the subject matter of the Perjury count are as follows:

"Q. Do you know an individual by the name of Joseph Bald?*. A. His name doesn't come to my mind.

"Q. To the best of your recollection, have you ever met Mr. Joseph Bald before? A. I don't recall.

* * * * *

"Q. Do you know an individual by the name of Paul Bicera, Bicera? A. I don't recall any such name.

"Q. To the best of your recollection have you ever heard the name Paul Bicera mentioned beore? A. Isn't that the name you just said?

"Q. Yes. A. No, I don't recall the name.

"Mr. Morvillo: May I have this marked Grand Jury Exhibit I for identification, please.

"(Photograph marked Grand Jury Exhibit I as of this date).**

"Q. Mr. Carson, I show you what has been marked Grand Jury Exhibit No. I for identification which for the record is a photograph of a male individual.

"Have you ever seen the person depicted therein before to the best of your recollection? A. I don't recall the face.

"Q. Do you know an individual by the name of Edward Adams?*** A. I can't recall the name.

"Q. That name does not ring a bell to you? A. Not specifically" (A. 15-16, 325-327).

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*Petitioner had met Bald on one occasion, in mid-November (Tr. 555).

** The photograph appears to have been one of only the shoulders and head (Tr. 1410).

*** It appears that Adams was universally known as "Eddie" Adams rather than "Edward" Adams. Thus, immediately after the Grand Jury appearance, the petitioner explained to the prosecutor, "I had always thought of him and had my mind not on Mr. Edward Adams but Eddie—Eddie Adams, we called him, and so I stated" (Tr. 1412).

It was only after the above question that the prosecutor placed his inquiries within a factual context which was calculated to have any meaning for the petitioner. He did this by asking about the defendant's acquaintance with Richard Kleindienst, the Deputy Attorney General of the United States. With the cat out of the bag, the prosecutor did not choose to return to the questions which had been met with a lack of recollection.

The petitioner acknowledged his acquaintance with Kleindienst, but invoked Senatorial privilege when asked "generally what you have occasion to discuss with Mr. Kleindienst in terms of official business" (A. 328). A reading of the Grand Jury minutes makes clear that, once the defendant recognized the nature of the inquiry, he first sought to claim the less stigmatized right of Senatorial privilege, and then made an unheeded request to consult with an attorney; finally, he invoked his right against self-incrimination (A. 328-331). Unrelenting, the prosecutor persisted in his questioning until it became clear that the defendant had gained his wits about him and would not testify without legal guidance.

It was during the course of the last described series of questions that the petitioner, we submit (see: Argument, *infra*, pp. —), purged himself of the appearance of perjury. Although not specifically returning to the question of whether the defendant knew the various individuals involved, the prosecutor asked:

> "Q. Calling your attention again to the day following your conversation with Mr. Kleindienst, did you have occasion to meet with Mr. Edward Adams and Mr. Paul Bicera and Mr. Walter Blond in your office in the Senate Office Building to discuss the possibility of fixing a criminal case here in the Southern District of New York? A. I decline to answer that.

"Q. On what grounds? A. Well, on the—on the grounds that I cannot discuss activities without complete resolution of the Senate.

"Q. Does it come within the scope of your official duties to discuss the fixing of criminal cases? Is that some official function that you serve for United States Senator Fong? A. I decline to answer.

"Q. On what grounds? A. On the grounds that it might tend to incriminate me.

"Q. Mr. Carson, did you ever receive any money from Edward Adams? A. I decline to answer on the same grounds.

"Q. On what grounds is that? A. Well, any of the ones——

"Q. That it might tend to incriminate? A. Any of the ones you set forth there. I'd like to discuss it with an attorney" (A. 330-441).

Significantly, before the petitioner was permitted to leave the Grand Jury room, the prosecutor directed him to wait outside the room (A. 332).

The reason for the latter request soon became apparent. Mr. Morvillo immediately joined the petitioner and brought him to his office, where, despite the desire to consult with counsel, that had been expressed in the Grand Jury room, the prosecutor continued questioning the petitioner and revealed to him the undercover role of Brana, the existence of the tapes and sundry other evidentiary items and claims of the prosecution (Tr. 1410-1413). This prompted the defendant to acknowledge that he recalled meeting the persons in question (Tr. 1412-1413). At or about the same time, the petitioner saw Agent Brana walking outside of Mr. Morvillo's office. He immediately went up to Brana, spoke with him and pointed him out as being the person who had come to his office (Tr. 1413-1414).

Notwithstanding the petitioner's recollections (or, as the prosecution would have it, admissions), the prosecutor did not bring him right back to the Grand Jury room.

It was thus that the indictment was bolstered by a charge of perjury.

Reasons for Granting the Writ

This case raises important questions under the Constitution and Laws of the United States. Moreover, in its opinion, the Court of Appeals noted that its decision "has certain precedental value concerning interrelationships of influence between Congress and the Executive" (2a).

I.

The Court of Appeals has overreached the intendment and literal meaning of 18 U.S.C. 201 in applying its prohibitions to the conduct of the petitioner. Additionally, the Court's decision has made a wide range of common Congressional activity subject to prosecution.

The conspiracy count of the indictment charged that the defendant conspired (18 U.S.C. § 371) with Adams, Bald and Blond to cause travel in interstate commerce (18 U.S.C. § 1952) for the purpose of committing bribery (18 U.S.C. § 201). It is clear that, without the bribery objective, the conspiracy charge could not be sustained.

Concededly, the jury in the present case was permitted to, and probably did, convict the petitioner upon the theory that, pursuant to the conspiracy, he was to be the recipient of a bribe, ". . . in return for exerting his own influence for the illegal purposes" (16a). The Court of Appeals properly held that the propriety of such ". . . a conviction . . . Under § 201(c)(1) or (3) would necessitate a clear understanding on the part of the jury of the meaning of "official act" [(1)] and "act in violation of his official duty"[(3)] (16a)."

Subsections (c)(1) & (3) of the statute provide as follows:

"(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

* * * * *

(3) being induced to do so or omit to do any act in violation of his official duty; or . . . ."

The statute's reach is, however, limited by the definition of "official act," contained in subsection (a):

"(a) For the purpose of this section:

* * * * *

"official act means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit."

In its charge to the jury, the Trial Court did not read the definition of or otherwise define "official act" as found in § 201(a)(11a). Indeed, the Court's charge essentially read the "official act" definition out of the statute when it applied the law to the facts of the case:

"In other words, the crime may be established or completed even if the bribe is not successful. It is sufficient on this one aspect of the problem if the paying or offering party intends that the official should be influenced *in some way*, or if the official seeks or takes or offers to accept or take money or property with the understanding or contemplation that he is to be influenced" (A. 49-50).

* * * * *

"In addition, in understanding the specific nature of the conspiracy charged in this case, remember what I have told you about the definition of the federal crime of bribery, the scope of the meaning of the term, 'public official,' and that the term, to be concrete in terms of this case, extends to officers or employees in either the executive, which includes the Department of Justice—or the legislative, which is primarily the Congress and the people working for members of the Congress; it includes employees or officials in both those branches of government.

* * * * *

"In this connection, I instruct you that if you find that a purpose of the conspiracy *was to influence either Mr. Robert Carson, as Senator Fong's administrative assistant,* or Mr. Kleindienst as Deputy Attorney General, or any other official of the Department of Justice *to do anything to discontinue or attempt to quash or in any way cause the suspension of a prosecution of a case pending here in the Southern District of New York, and it was the intention to do that either by offering or giving money to Carson* or by Carson's taking of money to give to anyone else, or to use as a political contribution, then you would be permitted to find that this element of the conspiracy, its relation to and purpose to promote or to facilitate or attempt to promote or facilitate the activity of bribery may be found to have been established by the evidence before you" (A. 56-58). (Emphasis added.)

At the termination of the main charge, the defense took exception to the manner in which the Court had paraphrased the requirements of Section 201. However, the exception did not specifically indicate the erroneous omission of the charge to define the term "official act" (A. 110-111).

After more than thirteen hours of deliberation, the Court's omission was revealed to be a source of confusion to the jury. There is set forth in the Court of Appeals' opinion, at pp. 12a-14a, fn. 8, the extended series of questions propounded by the jury to the Court. In response, the Court's supplemental charge to the jury provided them with the statutory definition of "official act," and stated, *inter alia*: "

> "Now, your next question is No. 4:
>
> "Is the public official's factual ability to influence a public act relevant to the charge? That is, if an official agreed to accept something of value to influence an act over which he had no influence, would that constitute bribery?
>
> "The answer would run this way: It is not necessary to find that the action or result sought by whoever hypothetically gives the bribe is something that was in fact within the power of the official in question. It would not be possible, on the other hand, for you to find a case of bribery if the action sought was so far outside the purview of the *official's duties as possible power* [*] or possible authority that it would be unreasonable for any reasonable man to have supposed he could have done anything about that particular subject.
>
> "Now, I think you could think of hypotheticals for yourself on that, and I think at this point I would like to leave you with that kind of situation, taking an absolutely extreme example: I imagine if an

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* This represented a continuance of the Court's inclination to disregard the "official act" requirement of the statute. The Court should have charged: ". . . if the action sought was so far outside the purview of the official's *official* duties or possible *official* power . . ." and should have emphasized that the mere fact that one is an official and has *political* or other types of *unofficial*, personal influence does not satisfy the requirement of the bribery statute.

elevator operator in this building took a bribe to influence the judicial conduct, it might well be found that that was so patently outside the purview of his likely or possible authority that it could not be reasonably supposed that he was given that money to influence an official act.* On the other hand, if in the case I put, another hypothetical case, an official with some seeming status or authority in a contracting agency took some money to influence who would get the contract, and if from factual and legal research you found this person really had no power to determine who would get that contract, you might still find the crime of bribery committed in the giving or the receiving. The fact that the giver may have mistaken the extent of the person's authority or power would not in itself be sufficient to avoid the finding of bribery if all the elements of that statute are made out. That is, the giving is with the intent to influence an official act and the taking is with the understanding that that is the purpose of that receipt." **

Finally, the Court reached the jurors' questions concerning the propriety of a (b) "third party" or (c) "gov-

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* This example did not cure the problem because it merely dealt with the obvious unlikelihood that an elevator operator would have sufficient influence over the person who is charged with making the decision sought to be influenced. By prefacing his conclusion with the qualifying phrase, "it might well be found", the Court left open the possibility that an elevator operator could be the *recipient* of a Section 201 bribe if he possessed an actual power of suggestion over a Judge, although the operator, himself was not, as part of *his* official duties, engaged in any aspect of the judicial process.

** Likewise, this example has no bearing upon the facts of this case and could give no proper guidance to the jury. The defendant had no apparent *official* power over the questions of whether cases would be prosecuted or leniency could be given. In regard to these functions, he had no greater actual or apparent status than an influential layman.

ernment official" going to a "judge", or "Justice Department" or the "Attorney for the defense", for the purpose of bringing "forth pertinent information which may influence the weight of a sentence." He responded with the following example, which shed no accurate light upon the official acts of a congressional assistant:

> "If somebody were to give money to a prosecutor to go to a judge with the purpose of influencing the judge in his sentence one way or another, and it was understood that that was the purpose and the giving was corrupt in that sense, then the giving of that money would be a bribe. And I think that is substantially the answer to your question" (A. 216).

Within three hours, including the luncheon hour, after the court concluded its supplemental charge, the jury returned its verdict (A. 221).

It is clear that the jury was left with no realistic guidance as to the most crucial aspect of the conspiracy count. The judge had omitted the definition of "official act" from his main charge, ano actually misdirected the jury as to whether the defendant could properly be the *subject* of a bribe as to the results sought by the alleged conspiracy. There can be no doubt that this is what the jury sought guidance upon in its questions, and no guidance was given to them. The one reading of the definition in the supplemental charge was lost amid a series of inappropriate and misleading examples. We submit that the only theory upon which the defendant could correctly have been convicted, if supported by the credible facts, was that he conspired to offer a bribe to Kleindienst for the purpose of terminating the prosecution. The Court's charge and supplemental charge permitted the jury to convict if they believed that the defendant had *taken* a bribe to use his *personal* (as opposed to "official") influence in regard to trying to get others to terminate the prosecution or to later seek to ex-

ercise his *personal* influence for the purpose of securing a lenient sentence.

The decisional law is clear that there is a bribe under this statute only if the recipient is a public official who is officially empowered, or, at least appears to be officially empowered to make or participate in the act or decision sought to be influenced. *United States* v. *Birdsall*, 233 U.S. 223 (1914). Thus, an interpreter employed by the Treasury Department, who offered his services to translate documents to be offered in a United States Court, has been held not to have been performing an Official Act during the latter service for the purpose of this statute, *In Re Wong Sing*, 83 F. 145 (N.D. Wash., 1897); an internal revenue agent who takes a bribe to burn down a still has been held not to be within the range of his official acts, *United States* v. *Gibson*, 47 F. 883 (N.D. Ill., 1891); an officer who does not have the official authority to give or recommend a priority or advantage sought, is, likewise, outside the purview of the statute, *United States* v. *Stabler*, 169 F.2d 991 (6th Cir., 1948). In short, there must be some direct nexus between the end sought and the official duties of the recipient of the bribe. If his position vis-a-vis the objective is no different than that of anyone who does not hold his position then no indictment can be sustained under 18 U.S.C. § 201.

The authorities cited by the Court of Appeals do not weaken our assertions in this regard (see opinion at 17a-18a). In each instance, the official involved had real or apparent decisional authority or was an *official participant* in the process leading to the decision or had lawful custody of information which he unlawfully sold. While some cases involving *military* officers appear to depart to some degree from the general rule, e.g. *Wilson* v. *United States*, 230 F.2d 521 (4th Cir.), *cert. denied*, 351 U.S. 931 (1956), they are in fact subject to a different rule since, as stated in *Canella* v. *United States*, 157 F.2d 470 (9th Cir. 1946):

> ". . . whenever officers of the United States army take any action whatever in regard to the army their official duties are involved. The United States is entitled to army officers who do not corruptly sell their recommendations to anyone on any subject." 157 F.2d at 481.

Although written within the context of a different statute (18 U.S.C. § 111), making it a crime to assault a federal officer during the performance of his official duties, the following holding applies equally here:

> "The test of a Government agent's conduct is whether he is acting within the scope of what he is employed to do, as distinguished from engaging in a personal frolic of his own." *United States* v. *Cho Po Sun,* 409 F.2d 489, 491 (2d Cir. 1969.)

See also: *United States* v. *Heliczer,* 273 F.2d 241, 245 (2d Cir., 1967).

If the defendant herein actually did offer to receive a bribe in regard to his own conduct, he was engaged in nothing less than "a personal frolic of his own", *United States* v. *Cho Po Sun, supra.* His act was not a violation of 18 U.S.C. § 201.

It is only by tortured reasoning that the Court of Appeals was able to fit the petitioner within the requirements of the statute:

> ". . . [A]ppellant, as an administrative assistant to a member of the Senate Judiciary Committee, clearly is [embraced within the terms of the bribery statute], in a situation in which his influence in connection with federal charges or penalties is sought" (18a).

There is no indication in the record that petitioner or any other Congressional aide ever was involved or purported to be involved, as an aide, in the decision making process concerning the course of criminal prosecutions. It

is bootstrap reasoning to say that the facts of this case establish such a status.

If believed, the prosecution's evidence merely revealed that the petitioner received a sum of money for the purpose of conveying to a member of his political party the offer that a large sum of money would be available as a campaign contribution if the course of a federal prosecution were altered. There was no indication that petitioner was depending upon his position as a Congressional aide to achieve the objective. That was the function of the political contribution. Moreover, the only person petitioner spoke to about the matter was his longstanding political companion and friend—Richard Kleindienst. The petitioner's conversation with Kleindienst was not in terms of a directive, advice or expression of congressional will.

If the petitioner's conviction is sustained upon the rationale advanced by the Court of Appeals, then much activity of Congressmen and their aides is illegal. Aside from the requirement of an official act, the gravamen of the crime under Section 201 requires that the public official:

> ". . . directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, * * * " (18 U.S.C. § 201 [c]).

There is no requirement that the objective sought by the person giving the thing of value be illegal (*United States* v. *Labovitz,* 251 F.2d 393, 395 [3d Cir., 1958]; *Daniels* v. *United States,* 17 F.2d 339, 343 [9th Cir., 1927], *cert. den.,* 274 U.S. 744 [1927]; *Kemler* v. *United States,* 133 F.2d 235, 238 [1st Cir., 1942]). Therefore, that the objective of this alleged conspiracy may have been to "fix" a criminal case, is irrelevant. Thus, if this decision stands, much of the "horsetrading" that goes on on Capitol Hill for purposes, even in part, of securing political support, contributions or "anything of value" in behalf of any "entity" is illegal under this statute. Petitioner submits that it was most unlikely that Congress intended this result to obtain when it enacted Section 201.

II.

Petitioner was deprived of a fair trial when the Deputy Attorney General was called upon to, and did, combine his personal knowledge with unspecified hearsay for the purpose of giving the jury his opinion that petitioner was guilty of the crime charged.

Richard G. Kleindienst, who was Deputy Attorney General of the United States at the time of the events of this case and of the trial herein, testified as a prosecution witness.

Paragraph 3(e) of Count I of the indictment charged that on November 24, 1970, the petitioner approached Kleindienst and stated, "that a $100,000 political contribution would be made if something could be done to stop the prosecution of one of the defendants" in the Hellerman case. The indictment then goes on to state that "the offer was immediately and categorically rejected" (A. 10-11).

The indictment's narration of this incident, particularly the gratuitous reference to an alleged rejection, left no other interpretation than that both parties to the conversation understood a bribe to have been offered. This claim is to be contrasted with Kleindienst's testimony as to the substance of the conversation, *supra,* p. 10.

Kleindienst then testified that one week later he reported the substance of the above conversation to the Attorney General of the United States. The prosecutor attempted to have Kleindienst explain why he reported it to the Attorney General of the United States, but a defense objection to that line of questioning was sustained (Tr. 1144-1145).

On cross-examination, Kleindienst said that the total conversation had a duration of fifteen minutes or less (Tr. 1165), and that the portion relating to the New York case was less than a minute or two (Tr. 1167). Thereafter, the

only communication of any kind that he had with petitioner was a telephone conversation, the sole subject matter of which was a judicial appointment (Tr. 1172-1174).

On December 1, 1970, Kleindienst was shown a memorandum which had reference to petitioner, and which was addressed to the Attorney General from the Director of the F.B.I. (Tr. 1169). This was the reason that he hurriedly made a report to the Attorney General (Tr. 1168-1170).

During the period from November 24 until seeing the F.B.I. memorandum on December 1, Kleindienst had given no further thought to his conversation with petitioner (Tr. 1171). Defense counsel elicited the following from Kleindienst concerning the nature of his conversation with petitioner:

> "Q. It is true, then, is it not, that on November 24, 1970, you did not regard that in the conversation you had with Mr. Carson that he offered you a bribe? A. *No, I did not.*
>
> "Q. If you had regarded that conversation as containing a bribe offer, you would have immediately reported it, would you not? A. Yes, sir, I would have.
>
> "Q. And you would have initiated the appropriate action to deal with it, isn't that true? A. Well, I would have reported it and taken that action that the circumstances warranted.
>
> * * * * *
>
> "Q. And it was not until after that [seeing the FBI communication] that you did or said or wrote anything with respect to the conversation of November 24th? A. Within minutes after I saw that, and at 10:00 I prepared the memorandum with Mr. Peters on that day, that is correct" (Tr. 1174-1176). [Emphasis added.]

On redirect examination, the Court sustained a defense objection to the prosecutor's attempts to elicit from Kleindienst the nature of the information which he learned on December 1st and which prompted the writing of his memorandum concerning his conversation with petitioner (Tr.

1177-1178). When the prosecutor pressed his desire to probe Kleindienst's state of mind as of December 1, the following occurred:

> "The Court: Well, I think there is enough of that, *but I think that the possibility of getting in hearsay that goes to the merits of the case outweighs the need to express that and I sustained the objection.*"

By Mr. Morvillo:

> "Q. *After learning what you learned on December 1, 1970, with regard to the fact that there was an investigation involving Mr. Carson, did you then consider what had happened on November 24th to have been a bribe offer? A. Yes.*
>
> *"Mr. Morvillo: No further questions"* (Tr. 1178). [Emphasis added.]

As can be seen, this dramatic conclusion to Kleindienst's testimony on redirect was in direct violation of the Court's ruling.

On recross-examination, Kleindienst confirmed that whatever it was that made him change his mind a week later, it was not the substance of the conversation that he had had with petitioner and it was not any conversation that he had with petitioner during the interim (Tr. 1178-1180).

In his summation, the prosecutor used Kleindienst's conclusion of guilt, based upon hearsay, to its fullest extent, and at length (Tr. 1664-1665).

Petitioner submits that Kleindienst's testimony, based upon an FBI report not in evidence, was prejudicial hearsay, violative of the petitioner's rights of confrontation and cross-examination under the Sixth Amendment. The Court of Appeals appears to give some support to this contention:

> "The question on redirect, unlike that on cross-examination, undoubtedly was prejudicial; furthermore, it called for a statement of opinion based not upon personal observation but upon inadmissible hearsay evidence, *i.e.*, the government memorandum. Hence, the answer elicited was not qualified by

knowledge and was objectionable. *See* 2 J. Wigmore, Evidence § 657, at 762 (3rd ed. 1940)" (22a).

However, the Court appears to find that there was some kind of a waiver due to the failure of petitioner's counsel to object to the particular question:

> "We do not find plain error in this admission, however. The question arose on redirect. It was in rebuttal to a matter probed on cross-examination, seeking to cast doubt on the witness's credibility at trial. It ill behooves the defense to argue prejudice here, having failed to object to the improper question on redirect, when the reach of the cross-examination invited, if not required, explanation by the witness of his failure to recognize in the first instance an approach which the Government now was prosecuting as an attempt to bribe" (22a).

In asserting that a proper objection was not interposed, the Court of Appeals has drawn a meaningless distinction between the immediately preceding questions and the one now claimed to be error. The trial Court had made it clear both on direct examination of Kleindienst and redirect examination that the prosecutor would not be permitted to utilize Kleindienst for the purpose of placing the contents or conclusions of the FBI report before the jury. In view of that fact, no meaningful waiver can be found for counsel's failure to object before the one-word answer, "Yes." The onus of the problem should properly be placed on the prosecutor, who created it.

Kleindienst was a participant in the conversation, he was a friend and political ally of the defendant, and he was the second highest prosecutorial official of the United States. His opinion, based on hearsay, that the petitioner was guilty of the crime charged, was extremely prejudicial and violated petitioner's right to be confronted by his accusers and to exercise his right of cross-examination. *Bruton* v. *United States*, 391 U.S. 123 (1968); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Broonhart* v. *Janis*, 384 U.S. 1 (1966); *Roberts* v. *Russell*, 392 U.S. 293 (1968); *United States* v. *Petrone*, 185 F.2d 334 (2d Cir., 1950).

III.

Petitioner effectively recanted his allegedly false grand jury testimony.

The facts concerning petitioner's grand jury testimony are set forth, *supra*, at pp. 16-19. Petitioner submits that the circumstances under which he invoked Senatorial and Fifth Amendment privilege constituted an effective recantation of any false testimony he may have given moments before. This is particularly so in view of the formal recantation which the petitioner gave to the prosecutor immediately after the grand jury appearance (*supra*, p. 19).

The Court of Appeals rejected our argument as follows:

> "There is no real evidence that appellant testified mistakenly [12] or carelessly, and hence *United States* v. *Norris*, 300 U.S. 564 (1937), stands squarely in his way; moreover, as the Government correctly points out, assertion of the fifth amendment privilege does not by itself imply any fact. *See Grunewald* v. *United States*, 353 U.S. 391, 415-24 (1957)" (23a).

In *United States* v. *Norris*, 300 U.S. 564 (1937), this Court noted the sparcity of authorities on this issue (300 U.S. at 575). *Norris* held that:

> ". . . the plain words of the [perjury] statute and the public policy which called for its enactment alike demand we should hold that the telling of a deliberate lie by a witness completes the crime defined by the law. This is not to say that the correction of an innocent mistake, or the elaboration of an incomplete answer, may not demonstrate that there was no willful intent to swear falsely. We have here no such case" (300 U.S. a 576).

As pointed out in *Fotice* v. *United States*, 137 F.2d 831 (8th Cir., 1943), *Norris* turns upon its own facts:

> "There is nothing in the case of United States v. Norris * * * to require a contrary conclusion. In that case the Supreme Court held that a witness who commits wilful perjury cannot purge himself of the offense by appearing at a later stage of the hearing and confessing that his testimony was false * * *

> "The evidence here bears no resemblance to that in the Norris case. Here the witness, upon being confronted with evidence of the oath which he had testified he did not remember, immediately and freely admitted his error. He did not, as did the defendant in the Norris case, wait until his perjury had been exposed and then return to the stand to confess it and ask to be permitted to tell the truth.* * *" (137 F.2d 842-843).

See also *Conrad* v. *United States*, 225 F.2d 247 (5th Cir., 1958).

We submit that the defendant's claim of privilege concerning his involvement with Bald, "Bicera" and Adams constituted a retraction of his prior answers as to his recollection of these people. The circumstances of his testimony are such as to call for a resolution of this matter in his favor rather than highly technical construction which would permit a finding of guilt. He came to the Grand Jury without any forewarning of the nature of the proceeding or of the statutes whose violation were being investigated. One can well imagine the shock to a man in his position upon learning that he is the target of a bribery and conspiracy prosecution. His exposure to most of the people involved had been brief. His ability to grasp his situation and the appropriate response must reasonably have been impaired. The prosecutor played cat and mouse with him until the damage was done, and only then revealed enough facts for the matter to be placed in perspective.

We do not contend that the statements later made in the prosecutor's office were, in and of themselves, sufficient to purge any falsehood if there was any. However, this later willingness to speak is a factor to be taken into consideration.

We rest our main reliance upon the petitioner's claim of privilege. That claim was made as soon as enough facts were revealed to unequivocally provide a basis for recollection. Can it be that under those circumstances only an inculpatory statement would cure the error? We submit that the claim of privilege was an implicit retraction of the prior responses. Although we have not found any case in

point, the logic of the argument precisely satisfies the policy behind the prohibition of perjury. There is no conceivable way that the Grand Jury could have been led astray by the testimony of this petitioner. His claim of privilege effectively neutralized his prior incorrect testimony, and, if anything, sharpened the Grand Jury's quest.

While it is generally the case that no inference may be drawn from the invocation of the Fifth Amendment privilege, the situation here is thoroughly inapposite to that found in the authorities cited for that proposition. The issue here concerns the state of mind of the witness at the time he was given his testimony. To have required more would have been to impel the petitioner to incriminate himself. He went as far as was necessary under the circumstances.

IV.

The prosecutor's credibility and personality became such central factors that the petitioner was deprived of a fair trial.

(1) Mr. Morvillo was the prosecutor in charge of the very indictment which the alleged conspiracy herein sought to get quashed (Tr. 1465-66). For this to have been accomplished, he would have had to be "reached"; i.e., Morvillo would logically have been the ultimate person to be influenced by the bribe.*

There was thus depicted at the instant trial an outraged public servant wielding the sword of justice against those who contemplated corrupting him. That this was the true posture of the case as it went to the jury is demonstrated by Mr. Morvillo's cross-examination of the petitioner and his summation (Tr. 1445, 1465-1468, 1507-1508, 1653-1656, 1674**, 1683***).

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* We do not suggest that this would have been possible.

** ". . . if *we* were so anxious to put money in Carson's pocket, there was an opportunity on December 1st" (Prosecutor's summation, Tr. 1674).

*** ". . . he lied on January 6th, he lied with regard to everything *we* asked him after he admitted his name" (Prosecutor's summation, Tr. 1683).

Moreover, it was Mr. Morvillo who met with Hellerman and Brana for the purpose of infiltrating the petitioner's office (Tr. 776), who appears to have dictated the subpoena which summoned the petitioner to the grand jury (A. 338), who examined him before the grand jury (A. 320), and who received the post-grand jury admissions of the petitioner (Tr. 1410-1414).

In the midst of trial, both the prosecutor and the Court recognized the danger that Morvillo's involvement in the facts of this case, when combined with the fact that he was the prosecutor, posed to the requirements of a fair trial (Tr. 1526).

(2) Realizing that, by crossing his arms in front of the speakers that were taped to his chest, Brana could, at will, cut off the sound that went to the recording device, defense counsel argued in summation as follows:

> "And in the course of what you can read from the transcript of that recording, made as a matter of convenience, because it becomes quite clear that what is not wanted to be heard becomes inaudible and what is wanted to be heard, I respectfully suggest to you Judges of the fact, you can hear as loud and clear as the loudest bell * * *" (Tr. 1627).

At the commencement of his summation, the prosecution let forth a vitriolic personal blast against defense counsel which was clearly prejudicial to the defendant and which placed the prosecutor squarely in the position of giving his personal opinion of guilt to the jury:

> "In starting my summation, I want to go directly to something that Mr. Brill said that has a great deal of significance with regard to this case. In adverting to Mr. Brana and in adverting to the transcripts and the tape recordings, Mr. Brill said, 'what is not wanted to be heard is inaudible', and suggested to you quite plainly that Brana was deliberately folding his arms and closing out beneficial testimony to Mr. Carson. *I suggest to you, ladies and gentlement of the jury, that such contention is not true, that it is a low and dastardly remark to make, and is not worthy of consideration.*

"[Defense counsel]: Your Honor, I regard this as a matter of personal privilege and I rise on that point.

"The Court: Well, let's leave out things like 'low and dastardly' Mr. Morvillo. You can otherwise argue the adequacy or inadequacy.

"Mr. Morvillo: It is not worthy of any consideration on your part. If you believe for one minute, if you believe for thirty seconds that Mr. Brana deliberately lied, that he deliberately concealed evidence, that he deliberately suppressed evidence *as a representative of the F.B.I. and of the United States,* your duty is to acquit this man regardless of what other piece of evidence came in in this courtroom.

"Mr. Brill: I object to that. I don't think that's true, your Honor.

"The Court: That's argument, and I will allow it.

"Mr. Morvillo: Paul Brana didn't suppress evidence. Those tape recordings speak for themselves. Those transcripts speak for themselves. If you think it is necessary, listen to them again, and read them again, and let's be done with Mr. Brill's red herring" (Tr. 1650-51).

Beyond any doubt, the tape recordings were a central fact in this prosecution. By allegedly filling in the gaps of inaudibility, Brana turned innocuous and explainable statements of petitioner into conspiratorial assertions. The defense was obliged to cast doubt upon the memory and credibility of Brana. The prosecution was obliged to limit itself to a reasoned argument rather than a passionate outcry of personal vindictiveness which placed the stamp of credibility and patriotism upon Brana.

Not content with placing himself in the balance, the prosecutor attempted to draw the Judge in as well. The witness Bald had been the only prosecution witness to testify to the events in petitioner's office which preceded the petitioner's visit to Kleindienst. Realizing the crucial nature of the witness, the prosecutor argued as follows in an attempt to shore up his questionable credibility:

> "Keep one thing in mind. Mr. Bald is through with this case. He pleaded guilty—you heard him say that he pleaded guilty to the conspiracy, to this indictment. The only thing left that can happen to Mr. Bald is that he has to be sentenced. Do you think that man would be crazy enough to come into the very courtroom *presided over by the Judge who was going to sentence him* and compound the crime that he has admitted by perjuring himself again?" (Tr. 1657).

On the other hand, the prosecutor attempted to deprecate the right of a defendant to testify in his own behalf and the presumption of innocence which attaches to any defendant in a criminal case:

> "The defendant, Robert Carson, on the other hand, has every reason in the world to lie. That he has had every reason in the world to lie right from the start of this case, and *that is precisely what he has done.*
>
> "Because, you see, if he fools you he walks out of here a free man, and I submit to you that there is no greater motive to lie in the world than that" (Tr. 1658).

Carrying on with the injection of his own personality into the case, until cut off by an objection by defense counsel, the prosecutor made such comments in his summation as: "I vouch to you people that when you go into that jury room tonight—[objection]"; "the Grand Jury testimony [of Carson] is a tissue of lies" (Tr. 1683); ". . . the fact is that he lied on January 6th, he lied with regard to everything *we* asked him after he admitted his name" (Tr. 1683); "Robert Carson betrayed a public trust, a very sacred public trust, he betrayed that trust in mid-November, on November 23rd, on November 24th, on December 1st, on December 29th, on January 6th, and *yesterday* [in his trial testimony]" (Tr. 1684).

In short, the prosecutor's degree of involvement in the pre-trial development of this case and the nature of his argument to the jury were such as to be violative of the standards of due process. Section 5.8 of the American Bar

Association's Standards Relating to the Prosecution Function (tentative draft, March 19, 1970) provides as follows:

> "Argument to the jury.
>
> "(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> "(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> "(c) The prosecutor should not use arguments calculated to inflame the passions or prejudice of the jury.
>
> "(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused, under the controlling law, or by making predictions of the consequences of the jury's verdict."

See also: *Berger* v. *United States,* 295 U.S. 78 (1935); *Harris* v. *United States,* 402 F.2d 656 (D.C. Cir., 1968) [Per then Circuit Judge Burger]; *Hall* v. *United States,* 419 F.2d 582 (5th Cir., 1969); *Dunn* v. *United States,* 307 F.2d 883 (5th Cir., 1962).

In this trial, the prosecutor violated the above standards. We submit that, in view of his personal involvement, he should not have tried the case; having done so, it was his responsibility to keep his personal beliefs and attitudes as to the guilt or innocence of the petitioner suppressed in the presence of the jury. He failed to do so and turned the prosecution into a contest between himself and the petitioner. For that reason, the proceedings were deprived of objective integrity and the petitioner was denied the due process of law to which he was entitled.

The Court of Appeals did not see fit to answer our arguments in this regard (see opinion at 25a).

CONCLUSION

For all of the above reasons, the petition for a writ o certiorari should be granted.

Respectfully submitted,

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